

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

EDWARD JAMES EGAN, #1031220,

Petitioner,

v.

ACTION NO. 2:17cv439

HAROLD W. CLARKE,
Director of the Virginia
Department of Corrections,

Respondent.

**UNITED STATES MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION**

This matter is before the Court on Virginia inmate, Edward James Egan's ("Egan") *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF No. 13. This matter was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Civil Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia. ECF No. 35. For the following reasons, the Court **RECOMMENDS** that Egan's petition, ECF No. 13, be **DISMISSED WITHOUT PREJUDICE** to Egan's right to present his claims after obtaining an order from the United States Court of Appeals for the Fourth Circuit authorizing the filing of a successive petition.

On February 14, 2018, Egan submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 attacking his convictions, in the Circuit Court for the County of Roanoke, for assault and battery and sexual abuse. ECF No. 13 at 1 (referencing *Commonwealth v. Egan*, No. CR03000739-00 and CR03000740-00 (Va. Cir. Feb. 9, 2004)). As a result of these convictions,

Egan was sentenced to 18 months in the Virginia penal system on February 9, 2004.¹ *Id.* Egan also references his criminal proceedings in the Juvenile and Domestic Relations Court for the County of Roanoke, where he was convicted of sexual abuse on September 9, 2003, and sentenced to 12 months of incarceration. *Id.* (providing case numbers JA01290-01-00 and JA01290-02-00). According to the “Virginia Courts Case Information” online service, Egan’s sexual abuse charge was initiated in Juvenile and Domestic Relations Court, and appealed to the Circuit Court for the County of Roanoke. *Commonwealth v. Egan*, No. CR03000740-00 (Va. Cir. Feb. 9, 2004).

Egan has previously filed two petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 attacking his February 2004 convictions for sexual abuse and assault and battery. On July 24, 2010, Egan filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia attacking these convictions. *Egan v. Johnson*, No. 7:10cv336, 2010 U.S. Dist. LEXIS 90131, at *2 (W.D. Va. Aug. 31, 2010). The Western District of Virginia dismissed Egan’s petition as untimely on August 31, 2010. *Id.* at *9–10.

On February 5, 2014, Egan filed a second petition for a writ of habeas corpus in this Court attacking his February 2004 convictions for sexual abuse and assault and battery. *Egan v. Clarke*, No. 2:14cv39 (July 10, 2014), ECF No. 1.² Egan’s successive petition was dismissed without prejudice to presenting his claims after obtaining an order from the Court of Appeals for the Fourth Circuit authorizing the filing of a successive petition. *Id.*, ECF No. 41. The United States Court of Appeals for the Fourth Circuit denied Egan’s motion for a certificate of appealability and

¹ On June 11, 2004, Egan was convicted in the Circuit Court for the County of Roanoke for two counts of forcible sodomy, one count of rape, and one count of inanimate object penetration, and was sentenced on November 18, 2004, to serve over 100 years in the Virginia penal system. *Commonwealth v. Egan*, CR03000735-00–738-00 (Va. Cir. June 11, 2004). Egan is currently in custody as a result of these June 2004 convictions.

² In the same petition, Egan also attacked his June 11, 2004 convictions. *Egan v. Clarke*, No. 2:14cv39 (July 10, 2014), ECF No. 1.

dismissed his appeal of this Court's order. *Id.*, ECF No. 54.

Egan's current petition, which seeks relief from the same February 2004 convictions, is a successive section 2254 petition. Pursuant to 28 U.S.C. § 2244(b)(3)(A), "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." This Court has not received an order from the Court of Appeals for the Fourth Circuit authorizing the consideration of Egan's successive application for a writ of habeas corpus. Therefore, this Court may not consider Egan's successive application for a writ of habeas corpus.

It is therefore **RECOMMENDED** that Egan's federal petition be **DISMISSED WITHOUT PREJUDICE** to Egan refiling his federal petition after obtaining an order authorizing the filing of a successive petition from the Court of Appeals for the Fourth Circuit.


REVIEW PROCEDURE

By copy of this report and recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within fourteen (14) days from the date of mailing of this report to the objecting party, *see* 28 U.S.C. § 636(b)(1), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. Rule 6(d) of the Federal Rules of Civil Procedure permits an extra three (3) days, if service occurs by mail. A party may respond to any other party's objections within fourteen (14) days after being served with a copy thereof. *See* Fed. R. Civ. P. 72(b)(2) (also computed pursuant to Rule 6(a) and (d) of the Federal Rules of Civil Procedure).

2. A district judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this Court based upon such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).



Robert J. Krask
United States Magistrate Judge

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United States Magistrate Judge

Norfolk, Virginia
March 12, 2019